

TABLE OF CONTENTS

I. INTRODUCTION.....3

II. STATEMENT OF FACTS.....5

III. POINTS AND AUTHORITIES RELIED UPON.....6

IV. DISCUSSION OF LAW AND ARGUMENT.....7

 A. Standard of Review.....7

 B. The trial court did not abuse its discretion by granting the Neelys' motion for a new trial because the jury's verdict was against the clear weight of the evidence.....8

 C. The trial court did not abuse its discretion in determining that the Neelys had made out a prima facie case of negligence.....13

V. RELIEF PRAYED FOR.....16

I. INTRODUCTION

The Appellee herein, Betty K. Neely and Johnny L. Neely, (hereinafter collectively "Appellee" or "the Neelys" and individually as "Mrs. Neely" and "Mr. Neely") filed this personal injury action in the Circuit Court of Raleigh County, West Virginia, as a result of injuries sustained by Mrs. Neely in the entryway of the Belk Department Store at the Crossroads Mall in Beckley, West Virginia. The Neelys alleged that, on 7 October 2002, a door through which Mrs. Neely attempted to enter, became unhinged and fell on her causing her injuries.

The case was tried to a jury between 24 October 2006 and 3 November 2006, during which conflicting evidence was presented as to whether the door came completely off its hinges and fell on Mrs. Neely, or whether it became only partially unhinged and fell into her. Additional conflicting evidence was presented as to the type and amount of injuries and damages the Neelys sustained. This evidence included surveillance footage of Mrs. Neely appearing to do actions which she claimed she could no longer engage in as a result of her injuries. There was no dispute at trial that the door had malfunctioned and fallen, to some degree, on Mrs. Neely when she attempted to enter the Belk store on 7 October 2002. No evidence was

presented to explain the cause of the door's malfunction.

Following deliberations, on 3 November 2006, the jury returned a verdict finding no liability on the part of the Appellant and awarding no damages to the Neelys. The trial court entered a final judgment on the verdict on 8 November, 2006. On 13 November 2006, the Neelys moved the court to set aside the verdict and to grant a new trial pursuant to W.Va.R.Civ.P., Rule 59. That motion was granted on 2 January 2007 by order of the Hon. Robert A. Burnside, Jr. The Appellant filed their Petition for Appeal on 1 May 2007.

Because there was no evidence at trial disputing that the door malfunctioned, to some extent, and fell upon Mrs. Neely, the clear weight of the evidence established liability on the part of the Appellant, each of whom had a duty to Mrs. Neely and other Belk customers. The trial court judge, who was in the best position to review the trial in its entirety and to evaluate the jury's verdict, determined that the jury's finding of no liability resulted from their conclusion that Mrs. Neely had exaggerated her damages claim. He further concluded that the verdict was grounded upon motivations which do not support the verdict. Because the trial court properly and carefully exercised its discretion in weighing the evidence presented and in

considering the credibility of the witnesses, the Neelys hereby request that this Honorable Court affirm the ruling of the lower Court.

II. STATEMENT OF FACTS

At trial, Mrs. Neely testified that one of the entrance doors to Belk Department Store in Crossroads Mall struck her right leg, knee and arm when she entered the store on 7 October 2002. (Trl. Tr. Day 5, p. 17.) The only eyewitnesses to this accident were Mrs. Neely and her daughter, Ms. Haley Clark. (Trl. Tr. Day 4, p. 192-3.) There was conflicting testimony as to whether the door had come completely off its hinges, as Mrs. Neely testified, (Trl. Tr. Day 5, p. 17) or whether the door had only come off its lower hinges as former Belk employees Frankie Lawson and Avis Bailey testified they found the door soon after the accident. (Trl. Tr. Day 3, pp. 177, 184, and 201.) It was admitted that Belk employees had had trouble with the door prior to the accident. (Trl. Tr. Day 3, p. 17.) And, it was established that the Defendant Newport Trading Company, Inc. had recently performed work on the door. (Trl. Tr. Day 3, pp. 17 and 35-6; Day 7, pp. 96, 101.

Conflicting evidence was presented as to the nature and extent of Mrs. Neely's injuries resulting from the accident. The Neelys presented evidence that Mrs. Neely

had developed reflex sympathetic dystrophy (RSD) and complex regional pain syndrome (CRPS) as a result of the accident. (Trl. Tr. Day 4, p. 44-48.) Appellant presented surveillance footage showing Mrs. Neely, intermittently, engaging in activities which she testified she was unable to do following the accident and limping and otherwise acting consistently with the injuries she claims. (See Exhibit A to Petition for Appeal; and, Trl. Tr. Day 5, pp. 15-6, 165-8.)

No evidence was presented by any Appellant either denying altogether that the accident had occurred or supporting a claim that it occurred other than through the negligence of the Appellant.

III. POINTS AND AUTHORITIES RELIED UPON

Adkins v. Chevron, USA, Inc., 199 W.Va. 518, 485 S.E.2d 687 (1997).....15

Andrick v. Town of Buckhannon, 187 W.Va. 706, 711, 421 S.E.2d 247, 252 (1992).....14

Cook v. Harris, 159 W.Va. 641, 225 S.E.2d 676 (1976).....9

In re State Public Bldg. Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994).....7, 13, 16

Lamphere v. Consolidated Rail Corp., 210 W.Va. 303, 557 S.E.2d 357 (2001).....11, 12, 16

Strahin v. Cleavenger, 216 W.Va. 175, 603 S.E.2d 197 (2004).....13-14

Toler v. Hager, 205 W. Va. 468, 471, 519 S.E.2d 166, 169 (1999).....11

Webb v. Brown & Williamson Tobacco Co., 121 W.Va. 115, 118, 2 S.E.2d 898, 899 (1939).....14

West Virginia Rules of Civil Procedure, Rule 59.....8

IV. DISCUSSION OF LAW AND ARGUMENT

A. Standard of Review

This Court reviews a trial court's ruling granting a new trial on an abuse of discretion standard. *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994). That decision provides great guidance in the case at bar:

"It takes a stronger case in an appellate court to reverse a judgment awarding a new trial than one denying it and giving judgment against the party claiming to have been aggrieved. An appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial. A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule

59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion."

Id. at 121-2, 415-6. (Internal citations omitted.)

B. The trial court did not abuse its discretion by granting the Neelys' motion for a new trial because the jury's verdict was against the clear weight of the evidence.

A trial judge is not merely a referee but is vested with discretion in supervising verdicts and preventing miscarriages of justice, with the power and duty to set a jury verdict aside and award a new trial if it is plainly wrong even if it is supported by some evidence, and when a

trial judge so acts, his decision, being in discharge of his power and duty to pass upon the weight of the evidence to that limited extent, is entitled to peculiar weight and will not be disturbed on appeal unless clearly unwarranted.

Cook v. Harris, 159 W.Va. 641, 225 S.E.2d 676 (1976).

In its Memorandum, the trial court demonstrated that it had carefully exercised its discretion, according to the direction of this Court, in *Cook, supra*, as follows:

According to the evidence, as the Plaintiff opened a public door to enter the Belk department store at Crossroads Mall, the door somehow disengaged from its moorings and fell on her. Defendant Newport Trading had recently performed a repair or maintenance procedure on the door, although the evidence was not developed as to the exact nature of that procedure. It was not disputed at trial that that [sic] the door had fallen on the Plaintiff and no party offered any evidence to explain the cause of the fall.

It is the court's opinion that the Plaintiff presented a prima facie case against all defendants on the issues of duty, breach, proximate cause and damages... It cannot be said

that a door cannot fall except as the result of negligence, nor does evidence of a falling door shift the burden of proof. It is the court's opinion, however, that evidence produced at trial that a public door to a retail establishment fell on a patron constituted a prima facie case of negligence that places upon the defendants the duty to come forward with evidence to overcome the impact of the prima facie case...

The jury's finding on liability may be explained by reference to the Plaintiff's evidence of damages... It is the court's opinion that it is substantially likely that the jury's finding on liability is the result of their conclusion that the Plaintiff had exaggerated her damages claim, and that it is not supported by the evidence pertinent to liability....

Memorandum of the trial court, attached hereto as Exhibit A.

It is noteworthy that, although the trial of this matter lasted nearly two weeks and involved the testimony of 22 witnesses, no evidence was offered by the Appellants refuting the allegation that the accident happened, but only questioning the extent to which the door came off its

hinges and challenging the damages claimed. In considering the motion for a new trial, the court was required to "assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party...and give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." *Toler v. Hager*, 205 W. Va. 468, 471, 519 S.E.2d 166, 169 (1999).

Clearly, the Memorandum of the trial court, quoted above, demonstrates that all such conflicts were resolved in favor of the Appellants and all reasonable inferences were drawn in their favor. But, because there was no evidence to support a factual explanation for the accident, but for the negligence of the Defendants, the court determined that the clear weight of the evidence did not support the verdict. This careful and deliberate analysis and weighing of evidence is exactly what the many decisions of this Court require when a trial court hears a motion for a new trial. See, for example, *Lamphere v. Consolidated Rail Corp.*, 210 W.Va. 303, 557 S.E.2d 357 (2001):

In other words, the trial judge has unique knowledge of what occurred at trial that no other judge can have. Given such unique knowledge and intimate familiarity with the proceedings, it is

perfectly proper for the trial judge to use and consider that peculiar and personal knowledge when weighing the evidence and assessing the credibility in ruling on the motion for a new trial. *Id.* at 307, 361.

Nothing in the Appellant's Brief filed in this matter demonstrates that the trial court did not carefully and deliberately weigh the liability evidence. Surely if there were evidence that the Defendants were not liable for this accident, which the trial court had ignored, they would have emphasized it in their Petition. That the Appellants refused, *in camera*, prior to trial, to stipulate that the door fell on Mrs. Neely is not evidence. That Mrs. Neely and others conflicted in their testimony of the degree to which the door came off its hinges is utterly insufficient to support the jury's determination that the Defendants were not liable for the accident. The only eyewitnesses to the accident, Mrs. Neely and her daughter, testified that the door fell on Mrs. Neely. (Trl. Tr. Day 4, pp. 192-3; Day 5, p. 17.) Avis Bailey testified that it did not fall, but she was not a witness and was not in a position to know how the accident happened. (Trl. Tr. Day 3, p.177.) And, while the evidence called Mrs. Neely's credibility into

question, the quoted portion of the trial court's Memorandum demonstrates that it took note of that evidence.

This Court has repeatedly stressed the broad discretion vested in the trial court to "set aside the verdict, even if supported by substantial evidence, and grant a new trial." *In re State Public Bldg. Asbestos Litigation, supra*, at 121-2, 415-6. The verdict in the case at bar was not supported by substantial evidence, or any evidence regarding liability or the lack thereof, and, for that reason, the trial court was within its discretion in setting that verdict aside. No abuse of discretion having been demonstrated, the Petition for Appeal should be denied.

C. The trial court did not abuse its discretion in determining that the Neelys had made out a prima facie case of negligence.

"To prevail in a negligence suit, the plaintiff must prove by a preponderance of the evidence that the defendant owed a legal duty to the plaintiff and that by breaching that duty the defendant proximately caused the injuries of the plaintiff." *Strahin v. Cleavenger*, 216 W.Va. 175, 603 S.E.2d 197 (2004); quoting *Webb v. Brown & Williamson Tobacco Co.*, 121 W.Va. 115, 118, 2 S.E.2d 898, 899 (1939).

Appellants claim that the Neelys failed to present a prima facie case of negligence because of a lack of evidence of foreseeability, without which there is no duty, and also because they failed to prove damages.

The evidence presented by the Appellants themselves demonstrated foreseeability. Belk employees testified that there had been trouble with the door prior to the accident. (Trl. Tr. Day 3, p. 17.) And, it was established that the Defendant Newport Trading Company, Inc. had recently performed work on the door. (Trl. Tr. Day 3, pp. 17 and 35-6; Day 7, pp. 96, 101. Under the standards enumerated by this Court, this evidence shows that the Appellants had "actual or constructive knowledge or learn[ed] or should have learned or kn[ew] or reasonably should know [sufficient] to... trigger the owner's duty". *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 711, 421 S.E.2d 247, 252 (1992). (Internal quotations omitted.)

In another premises liability case decided by this Court, plaintiff successfully sued a gas station owner (Chevron) for damages when a crack in the station driveway collapsed under the plaintiff. On appeal, Chevron alleged Plaintiff failed to show that it had actual or constructive knowledge of the hidden' danger in Chevron's driveway. At trial, Chevron's manager testified that he knew about the

crack in the driveway at least one month before the collapse and had undertaken to repair the driveway by dumping gravel on it. This Court determined that was adequate proof of foreseeability and did constitute a prima facie case of negligence. *Adkins v. Chevron, USA, Inc.*, 199 W.Va. 518, 485 S.E.2d 687 (1997). Following this analysis, the trial court did not abuse its discretion in determining that the Neelys had made a prima facie case of negligence in the case at bar.

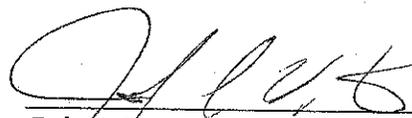
It is equally clear, even from the Appellant's brief itself, that the Neelys presented evidence of damages, and that the Appellants presented evidence challenging damages. While the jury was free to determine the credibility of this conflicting evidence, and even to award the Neelys no amount for damages, the jury was not free to ignore the liability evidence. The trial court was uniquely qualified to determine that the jury was improperly motivated in its finding of no liability. "There are many critical events that take place during a trial that cannot be reduced to record, which may affect the mind of the judge as well as the jury in forming the opinion as to the weight of the evidence and the character and credibility of the witnesses. These considerations can [not] and should not be ignored in determining whether a new trial was properly

granted." In re State Public Bldg. Asbestos Litigation,
193 W.Va. 119, 132-33, 454 S.E.2d 413, 426-27
(1994) (concurring opinion of Justice Cleckley); as quoted
in Lamphere v. Consolidated Rail Corp., 210 W.Va. 303, 307,
557 S.E.2d 357, 361 (2001).

V. RELIEF PRAYED FOR

For all of the reasons stated above, Appellee respectfully request that this Honorable Court affirm the ruling of the lower Court in this matter.

Respectfully submitted this 2nd day of January 2008.



John D. Wooton (WV Bar No. 4138)
The Wooton Law Firm
P.O.Box 2600
Beckley, West Virginia 25802-2600
(304) 255-2188
Counsel for Appellee
Betty K. Neely and Johnny L. Neely

CERTIFICATE OF SERVICE BY MAIL

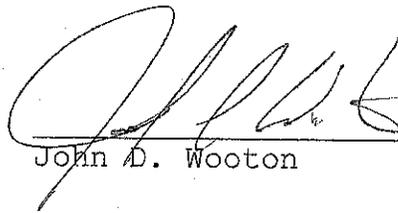
The undersigned hereby certifies that a copy of the foregoing **BRIEF OF APPELLEE** was served upon each of the parties or, when represented, upon their attorneys of record by deposit of such copy enclosed in a postpaid envelope, in an official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

Heather Heiskell Jones
Brian J. Warner
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard East
P.O.Box 273
Charleston WV 25321

Corey Palumbo
Bowles Rice McDavid Graff & Love
600 Quarrier Street
Charleston WV 25325

James C. Stebbins
Stebbins & Pinkerton, PLLC
P.O.Box 11652
Charleston WV 25339

This 7th day of January 2008.



John D. Wooton

Tenth Judicial Circuit

of



ROBERT A. BURNSIDE, JR.
CIRCUIT JUDGE
RALEIGH COUNTY COURTHOUSE

215 MAIN STREET
BECKLEY, WEST VIRGINIA 25801
TELEPHONE (304) 255-9128
FAX (304) 255-9191
E-MAIL robertburnside@courtsww.org

West Virginia

Raleigh County

MEMORANDUM

TO: John D. Wooton, Esq.
Heather Heiskell Jones, Esq.
James C. Stebbins, Esq.
Corey Palumbo, Esq.

FROM: Robert A. Burnside, Jr., Circuit Judge

DATE: January 2, 2007

RE: *Neely v. Belk, etc.*
Civil Action No: 03-C-593-B

On November 3, 2006, the jury returned a verdict for Defendants, upon which a final judgment order was entered on November 8, 2006. On November 13, 2006, Plaintiff timely filed a motion to set aside the verdict and to grant a new trial pursuant to Rule 59. That motion has now been fully briefed in accordance with the court's briefing schedule of November 14, 2006. Upon examination of the motion, response, reply, and upon consideration of the record of this matter, it is the court's opinion that the motion can be fairly and sufficiently considered without the necessity of oral argument.

The standard for the court's consideration of a Rule 59 motion for a new trial was stated in Syll. Pt. 3, *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994):

A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and



consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. (Emphasis added)

In its discussion of the standards the trial court must apply in its consideration of a motion for a new trial, the Court adopted the language found in 3 Charles Alan Wright, *Federal Practice and Procedure* § 553 at 247 (2d ed. 1982):

[O]n a motion for a new trial-unlike a motion for a directed verdict or for judgment notwithstanding the verdict-the judge may set aside the verdict even though there is substantial evidence to support it. He is not required to take that view of the evidence most favorable to the verdict-winner. The mere fact that the evidence is in conflict is not enough to set aside the verdict. Indeed the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury. But on a motion for a new trial on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the evidence for himself. Indeed it has been said that the granting of a new trial on the ground that the verdict is against the weight of the evidence 'involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself.' (Emphasis added)

Applying this criteria to the present motion, this court has reviewed the evidence presented during the trial of this action. According to the evidence, as the Plaintiff opened a public door to enter the Belk department store at Crossroads Mall, the door somehow disengaged from its moorings and fell on her. Defendant Newport Trading had recently performed a repair or maintenance procedure on the door, although the evidence was not developed as to the exact nature of that procedure. It was not disputed at trial that the door had fallen on the Plaintiff and no party offered any evidence to explain the cause of the fall.

It is the court's opinion that the Plaintiff presented a *prima facie case* against all defendants on the issues of duty, breach, proximate cause, and damages. Defendant Belk, as the proprietor of the department store, owed to Plaintiff a duty of due care to inspect and maintain the door, and to correct any conditions as to which it is reasonably foreseeable might cause injury to Plaintiff. Defendant Newport, as the entity hired by Belk to maintain and repair the door, is held to the knowledge that Belk's customers will use that door on a daily basis, and it owes a contractual duty to Belk, and a general duty directly to the anticipated customers, to perform the maintenance and repairs correctly. The evidence at trial was that Defendant Crossroads Mall, as the owner of the structure in which Belk is a commercial tenant, had not given up complete control of the premises to its tenant, and that it had participated to some degree in the inspections of the exterior doors.

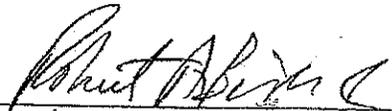
It cannot be said that a door cannot fall except as the result of negligence, nor does evidence of a falling door shift the burden of proof. It is the court's opinion, however, that evidence produced at trial that a public door to a retail establishment fell on a patron constituted a *prima facie* case of negligence that places upon the defendants the duty to come forward with evidence to overcome the impact of the *prima facie* case. The strength of the *prima facie* case, largely unchallenged by any Defendant, is such that the court must conclude that the jury's verdict on the issue of liability is contrary to the clear weight of the evidence.

The jury's finding on liability may be explained by reference to the Plaintiff's evidence of damages. Plaintiff claimed a substantial amount of damages for a life care plan, with questionable medical support, and her claim was seriously weakened by her own contradictory acts and statements. In addition, Defendants offered a surveillance video upon which a jury could conclude that she was exaggerating her symptoms when it was to her benefit to do so. The Plaintiff's evidence of damages may have seemed to the jury to be overstated. If the jury reached those conclusions, the correct result would be to reduce the damages to a level that the jury believed would fairly compensate the Plaintiff, but it would not be correct to find against the Plaintiff on the issue of liability because she presented a questionable case on damages.

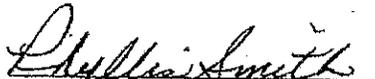
It is the court's opinion that it is substantially likely that the jury's finding on liability is the result of their conclusion that the Plaintiff had exaggerated her damages claim, and that it is not supported by the evidence pertinent to liability. That opinion supports that finding that the jury's verdict was grounded on motivations which, although understandable, do not support the verdict.

Accordingly, it is the Court's opinion that the Plaintiff's motion to set aside the verdict and to grant a new trial should be granted.

An order to this effect, information copy enclosed, was entered on the 2nd day of January, 2007.


ROBER A. BURNSIDE, JR.
CIRCUIT JUDGE

I hereby certify that the foregoing Memorandum was mailed to counsel of record listed above on the 2nd day of January, 2007.


Secretary to Judge Burnside

1/2/07

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

BETTY K. NEELY and
JOHNNY L. NEELY,

Plaintiffs,

Vs.

Civil Action No: 03-C-593-B

BELK, INC., CROWN AMERICAN
CROSSROADS, LLC, d/b/a
CROSSROADS MALL, AND
NEWPORT TRADING COMPANY, INC.,

Defendants.

ORDER

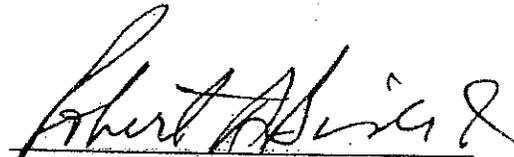
Granting Plaintiff's motion to set aside the verdict and award a new trial

In accordance with the Court's memorandum of January 2, 2007, incorporated herein by reference, it is

ORDERED that the Plaintiff's motion to set aside the verdict and grant a new trial should be and it is hereby granted.

The Clerk is directed to mail a copy of this order to counsel of record.

ENTER: January 2, 2007



ROBERT A. BURNSIDE, JR.
CIRCUIT JUDGE

This foregoing is a true copy of an order
entered in this office on the 2nd day
of Jan, 2007

JANICE E. DAVIS, Circuit Clerk of
Raleigh County, West Virginia

By: JD
Deputy